

No. 05-19-00607-CV

PETER BEASLEY,

Appellant,

v.

SOCIETY FOR INFORMATION
MANAGEMENT, ET. AL,

Appellees.

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IN THE 5th DISTRICT COURT

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS

COURT REPORTER
09/03/2019 04:13 PM

LISA MATZ
Clerk

DALLAS, TEXAS

VERIFIED MOTION TO RECUSE JUSTICES LANA MYERS AND ADA BROWN

TO JUSTICES OF SAID COURT:

NOW COMES, Appellant, Peter Beasley, *pro se*, pursuant to Rules 18a and 18b of the Texas Rules of Civil Procedure, and pursuant to the Rule 16.2 of the Rules of Appellate Procedure, in support of this Verified Motion to Recuse, states the following:

Grounds for Recusal

1. Pursuant to Rule 18a, as supported by declaration, Plaintiff seeks the recusal of The Honorable Justices Lana Myers and Ada Brown, on grounds that:

a. The judge's impartiality might reasonably be questioned. Tex. R. Civ. P. 18b(b)(1);

2. August 7, 2019, Associate Judge Monica Purdy confessed of a historical pattern of certain offices and officers of the courts within the George Allen Courthouse to not allow people who are alleged "vexatious litigants" from filling court documents and are prevented to have hearings in the free exercise of his American civil right of access to the courts. Exhibit A.

3. As it stands today, Beasley is on the list of vexatious litigants, to which he has perfected this appeal. While the Clerk of this court and the District Clerk have and continue to accept Beasley's documents for filing, he has no option but to accept Judge Purdy's admission with some weight and accept the fact that some court officers may not be impartial to people who are accused to be vexatious.

4. In the underlying proceedings, opposing Counsel Peter Vogel, a well-known lawyer in this jurisdiction has made the vexatious litigant allegation against Beasley.

5. Beasley contends Peter Vogel's allegation is false.

6. At the August 7, hearing Mr. Vogel presented Judge Purdy with another false legal assertion, that she could not allow Beasley a hearing, and based on his false assertion, Judge Purdy “**lied by omission**” in saying she did not have a referral order to allow her to give Beasley a hearing, when in reality she operates every day under an Omnibus Referral Order which gave her all the authority needed to allow Beasley a hearing.

7. Likewise, on November 1, 2018, Justices Myers and Brown (along with David Evans) considered Beasley’s appeal¹ of a \$211,032 attorney fee award to benefit Peter Vogel and his client. That panel, to affirm the judgment also “**lied by omission**” by leaving out the fact that Beasley limited his appeal under Rule 34.6(c), and the three justices applied the normal presumptions to affirm Peter Vogel’s judgment against Peter Beasley. Exhibit B.

8. While the opinion was authored by Justice Evans who is no longer on this court, it is not known if each or both Justices Myers and Brown concurred with leaving out the one essential fact from which Beasley might prevail in that appeal. Neither Justice Myers or Brown wrote a dissenting opinion with the corrected facts.

9. This court’s false opinion spawned yet another litigation in this conflict, which is now pending review by the Texas Supreme Court. Beasley’s attorney, Mr. Chad Baruch of Johnston, Tobey and Baruch **has suggested the Evans, Myers, Brown Rule 34.6(c) omission was intentional**. Exhibit C, and in this current appeal Beasley also makes a Rule 34.6(c) designation.

10. While Judge Purdy seems to indict the entire George Allen Courthouse, Beasley recognizes that many of the current Justices are new to the court as of January 1, 2019, and could not have been a part of the described history to deny the civil rights of alleged vexatious litigants. This motion is not based solely on the adverse rulings by these justices, as Justices Molberg², Nowell², Bridges³, Whitehill, and Schneck⁴ have given adverse rulings to Beasley within the past months and their recusal is not sought.

11. Pending before this court is Beasley’s request for temporary orders to direct the trial court to allow a Rule 12 challenge against attorney Peter Vogel. A similar request to challenge Peter Vogel has before been denied by Justice Brown. Exhibit D.

¹ No. 05-17-01286-CV

² No. 05-19-00422-CV

³ No. 05-18-00382-CV, No. 05-18-00395-CV

⁴ No. 05-18-00559-CV, No. 05-18-00553-CV

12. Beasley moves for the recusal of Justice Myers and Brown 1) based on the statement by a respected judge, the Honorable Judge Purdy, that certain court officers deny the rights of alleged vexatious litigants, 2) based on the argument by a respected attorney, Mr. Chad Baruch, that Justices Evans' opinion along with Myers & Brown might have been intentionally misrepresented to affirm the judgment, and 3) based on my belief that several people in the Dallas legal profession have demonstrated an inability to be impartial to people who are adversarial to attorney Peter Vogel, I think Justices Myers' and Brown's impartiality might reasonably be questioned.

13. Justices Myers and Brown have taken no part in this appeal thus far, the motion is timely, and the remaining eleven justices can certainly adjudicate this proceeding in panels or en banc.

ARGUMENT AND AUTHORITIES

14. Judges may be removed from hearing a case because they are constitutionally disqualified, or they are recused by Supreme Court rules. *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding).

15. It is without question that a fair trial requires an unbiased judge. As a core tenet, a fair hearing allows both parties the opportunity to be heard. Recusal is required where even the appearance of bias or favoritism occurs. It is inconceivable to me how Beasley's Rule 34.6(c) plea was overlooked.

16. Plaintiff requests the recusal of Justices Myers and Brown.

17. This motion is not filed for delay.

PRAYER

18. Beasley asks the Clerk of this Court to present the motions to Justices Myers and Brown for their consideration. If the justices do not individually grant the motion, Beasley requests a determination from the court en banc.

WHEREFORE: Plaintiff requests the justices recuse themselves, or if they decline to, that the matter be referred to the court en banc for a decision, by majority vote.

Respectfully submitted,

/s/Peter Beasley

Peter Beasley, pro se

P.O. Box 831359

Richardson, TX 75083-1359

(972) 365-1170

pbeasley@netwatchsolutions.com

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DECLARATION OF PETER BEASLEY

My first, middle, and last name is Peter Morell Beasley, my date of birth is September 20, 1958, and my address is 12915 Fall Manor, Dallas, Texas, 75243, United States. I declare under penalty of perjury that the foregoing statements are true and correct.

1. My name is Peter Beasley. I am over the age of twenty-one years, of sound mind, have never been convicted of any felony offense and I am fully competent and authorized to make this affidavit. I have personal knowledge of the facts stated herein and in the Motion to Recuse due to my personal involvement in the events and occurrences set forth, or are being made on information and belief. All of the facts stated herein are true.

2. This motion is not for delay and not based solely on the rulings of the court, but is based on the admission from Judge Purdy that the Dallas civil judges willingly violate the rights of citizens who happened to be accused to be vexatious litigants.

3. The attached documents are true copies of the documents they represent.

Executed in Dallas, State of Texas, on the 3rd day of September, 2019.

John Busby
Declarant

Certificate of Service

I hereby certify that on the 3rd day of September 2019, a true copy of the foregoing instrument was served on opposing counsel for the defendants by electronic means and the electronic transmissions were reported as complete.

/s/Peter Beasley
Peter Beasley

Exhibit A

REPORTER'S RECORD

TRIAL COURT CAUSE NO. DC-18-05278-J

PETER BEASLEY,)	IN THE DISTRICT COURT
)	
Plaintiff,)	
)	
VS)	DALLAS COUNTY, TEXAS
)	
SOCIETY OF INFORMATION)	
MANAGEMENT, DALLAS AREA)	
CHAPTER, ET AL,)	
)	
Defendants.)	191ST JUDICIAL DISTRICT

Motion for Sanctions
 Motion to Show Authority
 Motion to Set Hearing

On the 7th day of August, 2019, a hearing was heard in the above-entitled and numbered cause, and the following proceedings were had before the Honorable Gena Slaughter, Judge Presiding, held in the 191st District Court, Dallas County, Texas:

Melba D. Wright, Texas CSR #4666
 Official Court Reporter, 191st Judicial District Court
 Proceedings reported by Stylus stenotype machine;
 Reporter's Record produced by ProCAT Winner XP
 computer-assisted transcription

A P P E A R A N C E S:

FOR THE PLAINTIFF, PRO SE:

Mr. Peter Beasley
Post Office Box 831359
Richardson, Texas 75083

(214) 446-8486, Ext. 105

ATTORNEYS FOR THE DEFENDANTS:

Ms. Sonia Garcia
SBOT #: 24045917
Gordon & Rees
2200 Ross Avenue, Suite 4100 West
Dallas, Texas 75201

(214) 231-4741

Mr. Peter S. Vogel
SBOT #: 20601500
Foley Gardere Foley & Lardner, LLP
2021 McKinney Avenue, Suite 1600
Dallas, Texas 75201

(214) 999-4422

ALSO PRESENT:

Ms. Daena Ramsey
SBOT #: 08093970
Mr. Andrew S. Gardner
SBOT #: 24078538
Vaughan & Ramsey
2000 E. Lamar Boulevard
Suite 430
Arlington, Texas 76006

(972) 262-0800

Index

Motion for Sanctions
Motion to Show Authority
Motion to Set Hearing

August 7, 2019

PROCEEDINGS

PG

VOL

Announcements

4

1

Reporter's Certificate

11

1

PLAINTIFF'S WITNESSES:

DX

XE

RD

RX

VOL

None.

DEFENDANT'S WITNESSES:

DX

XE

RD

RX

VOL

None.

EXHIBIT INDEX

PLAINTIFF'S

OFFERED

ADMITTED

VOL

None.

DEFENDANT'S

OFFERED

ADMITTED

VOL

None.

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:09 a.m.)

3 THE COURT: Good morning. We are on
4 the record in Cause No. DC-18-05278, Peter Beasley
5 versus Society of Information Management, Dallas Area
6 Chapter, et al.

7 May I have the parties announce on the
8 record at this time? Let me know your name and who
9 you represent.

10 MR. BEASLEY: Peter Beasley
11 representing myself for the plaintiff.

12 THE COURT: All right. Thank you.

13 MS. RAMSEY: Daena Ramsey representing
14 myself.

15 MR. GARDNER: Andrew Gardner
16 representing myself.

17 MS. GARCIA: Sona Garcia on behalf of
18 defendants.

19 MR. VOGEL: Peter Vogel on behalf of
20 the defendants.

21 THE COURT: I understand what is set
22 today is a motion for sanctions, which has been filed
23 by the plaintiff; is that correct, Mr. Beasley?

24 MR. BEASLEY: Yes, there are two
25 motions -- three motions set for today, a motion for

1 sanctions, motion to show authority, and a motion for
2 a hearing to set a hearing.

3 THE COURT: Okay. Question for you,
4 Mr. Beasley: Have you filed or paid the applicable
5 fee with respect to being found to be a vexatious
6 litigant?

7 MR. BEASLEY: The fee?

8 THE COURT: Uh-huh.

9 MR. BEASLEY: You mean the bond?

10 THE COURT: Correct.

11 MR. BEASLEY: No. That was in -- yeah,
12 no.

13 THE COURT: Okay. And do you
14 understand that you can't file anything until that is
15 paid, that bond is paid, that that particular order is
16 saying that in order to proceed in Court, if you're
17 going to file any additional motions after that
18 particular order, that you would have to pay that bond
19 in which to do so?

20 MR. BEASLEY: No, I did not understand
21 that and --

22 THE COURT: That is the case.

23 MR. BEASLEY: Documents like the motion
24 for new trial on findings of fact and conclusions of
25 law, Ms. Ramsey, my attorney, has filed documents, so

1 I understand that order prevents me from filing
2 another lawsuit, without permission, and I understand
3 that Judge Slaughter --

4 THE COURT: Well, it essentially
5 prevents you from filing anything further, without
6 permission, until that particular bond is paid.

7 MR. BEASLEY: I don't understand it
8 that way. Again, even a notice of an appeal would be
9 something to file. Certainly that order can be
10 appealed, and that'll be a final appeal, a notice of
11 appeal.

12 THE COURT: What are you trying to
13 sanction, what conduct are you trying to sanction
14 today?

15 MR. BEASLEY: My former attorney, Ms.
16 Ramsey and Mr. Gardner. They have appeared in this
17 matter, without authority, so there is a motion for
18 them to demonstrate their authority to appear, and
19 then also sanctions for filing documents when they
20 didn't have the proper authority.

21 THE COURT: All right. Anything
22 you-all would like to say on the record with respect
23 to what the Court has represented in terms of the bond
24 not being paid, and the understanding that no further
25 documents might be filed in this Court until that

1 particular bond is paid?

2 MR. RAMSEY: I have no response to
3 that, Your Honor.

4 THE COURT: Okay. Mr. Vogel?

5 MR. VOGEL: That's my understanding as
6 well, Your Honor. And let me also add, with regards
7 to these three pending motions, as far as I can tell,
8 nothing has been referred from Judge Slaughter to this
9 Court to even have to get an order to rule on any of
10 the motions that are pending here.

11 THE COURT: Well, as we know, Judge
12 Slaughter is out --

13 MR. VOGEL: I understand that.

14 THE COURT: -- to even have that, so I
15 am --

16 MR. VOGEL: Or any other visiting
17 Judge, I'm sorry.

18 THE COURT: Correct.

19 MR. VOGEL: In other words, as far as I
20 know, there has not been a referral by any District
21 Judge in this county for you to consider any of these
22 three motions.

23 THE COURT: Correct. Correct.

24 MR. VOGEL: And without that authority,
25 I don't think that you could conduct a hearing today.

1 THE COURT: Okay. All right. Mr.
2 Beasley?

3 MR. BEASLEY: With the Court's ruling
4 and opinion that I can file nothing, could the Court
5 at least enter an order to that effect, that I cannot
6 file anything?

7 THE COURT: Well, we have two things
8 occurring right now.

9 First, you have this order out there
10 declaring you as a vexatious litigant, and it
11 indicates until a bond is paid, until you pay that
12 particular bond, you cannot continue to file things as
13 it relates to this lawsuit, or as it relates to
14 others, so that's one thing.

15 The second thing, as an Associate
16 Judge, as Mr. Vogel has pointed out, I have matters
17 that are referred to me from a District Court.

18 Judge Slaughter is in a unique position
19 this particular week, she's out, she's had a death in
20 her family, and I have been sitting for her Court
21 trying to manage those things that I can so that when
22 she does return, she's not so overwhelmed with things
23 that did not get done in her absence. And so a
24 referral has not been made to me. You will have to
25 set this before Judge Slaughter, but you need to pay

1 attention to or take a look or read that particular
2 order that declares you a vexatious litigant so that
3 you understand what you may do from this point
4 forward.

5 MR. BEASLEY: I've unfortunately have
6 read it too many times, and nowhere does it say I
7 cannot file anything more. Now, maybe there's some
8 case law that the Court is referring to, but that
9 order nowhere says I cannot file anything further in
10 this lawsuit.

11 THE COURT: Okay. You may want to have
12 a lawyer go over it, review it with you. I don't know
13 if you've have an opportunity to do that but,
14 historically, when someone has been declared a
15 vexatious litigant, until that bond is paid, they are
16 not able to file anything else in this particular
17 courthouse.

18 MR. BEASLEY: Not even a notice of
19 appeal?

20 THE COURT: Well, I can't give you
21 legal advice. So that's one of the downsides of
22 representing yourself.

23 what I'm telling you is, you might want
24 to take a look at that order again, you might want to
25 have a lawyer to review it, to explain to it you, but

1 I'm not in a position to give you legal advice. Okay?

2 So the three motions that you have set
3 today, they will not be going forward.

4 MR. BEASLEY: Okay.

5 THE COURT: okay?

6 MR. BEASLEY: All right.

7 THE COURT: All right. That concludes
8 our hearing. Thank you.

9 MS. RAMSEY: Thank you, Your Honor.

10 MR. VOGEL: Thank you, Judge.

11 MS. GARCIA: Thank you, Your Honor.

12 (Off the record - 9:15 a.m.)

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C E R T I F I C A T E

THE STATE OF TEXAS)

COUNTY OF DALLAS)

I, Melba D. Wright, CSR, Official Court Reporter in and for the 191st Judicial District, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in the statement of facts in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and was reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$125.00 and was paid by the Plaintiff, Mr. Peter Beasley.

Witness MY OFFICIAL HAND on this, the 15th day of August, 2019.

/s/ Melba D. Wright
Official Court Reporter
Expiration Date: 12/31/19
Texas CSR NO: 4666

191st Judicial District Court
600 Commerce Street
Seventh Floor
Dallas, Texas 75202

(214) 653-7146
wrightmelba@msn.com

Exhibit B

AFFIRMED; Opinion Filed November 1, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-01286-CV

PETER BEASLEY, Appellant

V.

SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, Appellee

**On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03141**

MEMORANDUM OPINION

Before Justices Myers, Evans, and Brown
Opinion by Justice Evans

Appellant Peter Beasley appeals the award of attorney's fees in favor of appellee Society of Information Management, Dallas Area Chapter.¹ Beasley also asserts that the trial court lacked jurisdiction to award attorney's fees to SIM-DFW. Finally, Beasley asserts that the trial court judge should be disqualified or recused based upon certain rulings. We affirm.

BACKGROUND

SIM-DFW is a national, professional society of information technology (IT) leaders which seeks to connect senior level IT leaders with peers, provide opportunities for collaboration, and provide professional development. Beasley was a member of SIM-DFW until April 19, 2016 when he was removed from the chapter during a board of directors' meeting.

¹ Appellee notes in its brief that its correct name is the Society *for* Information Management, not the Society of Information Management and that it is locally known as SIM-DFW. Accordingly, we refer to appellee as SIM-DFW.

In March 2016, Beasley filed a petition against SIM-DFW alleging claims for injunctive relief, breach of fiduciary duty, and for whistleblower protection under the Sarbanes-Oxley Act of 2002. On July 5, 2016, Beasley filed a motion for partial summary judgment requesting that the court sustain two of his declaratory judgment causes of action. Following the hearing held on August 15, 2016, the trial court denied this motion by order dated August 18, 2016.

On June 30, 2017, Beasley filed a sixth amended petition which limited his claims to claims for declaratory relief. Three causes of action sought declarations that: (1) the April 19, 2016 expulsion meeting was void; (2) the actions taken by the board following his expulsion are also void until ratified by Beasley; and (3) SIM-DFW's bylaws and articles of incorporation prohibit charitable donations of SIM-DFW's assets to non-members.

It appears that Beasley later filed a motion for no-evidence summary judgment and another motion for partial summary judgment. SIM-DFW also appears to have filed a traditional and no-evidence motion for summary judgment. A hearing for all of these summary judgment motions was set for October 16, 2017.² On October 5, 2017, however, plaintiff filed a notice of nonsuit and motion to dismiss all claims against all parties without prejudice.³ On October 18, 2017, SIM-DFW filed a motion for sanctions which stated that it had incurred attorney's fees in excess of \$193,000 in this lawsuit. During the hearing on this motion, the trial court requested that the parties provide briefing on whether there was a live request for attorney's fees. The trial court specifically requested briefing as to whether this situation merited an award of attorney's fees if Beasley nonsuited to avoid an unfavorable ruling. Both parties submitted additional briefing and

² Neither Beasley's nor SIM-DFW's motions for summary judgment were included in the clerk's record but the record does contain hearing notices for these motions.

³ The record also contains references to the fact that Beasley's responses to SIM-DFW's motions for summary judgment were due on October 5, 2017—the same day that he filed his nonsuit and motion to dismiss all claims.

a hearing was held on November 3, 2017.⁴ Following the November 3 hearing, SIM-DFW's counsel submitted a proposed order and the affidavits of Robert A. Bragalone and Peter S. Vogel supporting the request for attorney's fees in excess of the amount the trial court awarded. By order dated November 3, 2017, the trial court granted SIM-DFW's request for attorney's fees and awarded it \$211,032.02. In addition, the trial court's order granting attorney's fees recited the following:

1. Plaintiff filed certain declaratory judgment claims on April 15, 2016.
2. Defendant moved for summary judgment on those claims.
3. The hearing on the motion for summary judgment was scheduled for October 12, 2017, making Plaintiff's response due on October 5, 2017.
4. On October 5, 2017, in lieu of filing a response to the motion for summary judgment, Plaintiff nonsuited his entire case.
5. The following factors support a finding that the nonsuit was filed to avoid an unfavorable ruling on the merits:
 - (a) the timing of the nonsuit;
 - (b) the strength of the motion for summary judgment;
 - (c) the failure to respond to the motion;
 - (d) the Plaintiff's prior litigation history, including a dismissal of all claims after resting his case during trial, which dismissal he then appealed to the Dallas Court of Appeals;⁵ and
 - (e) Plaintiff's conduct during this very contentious litigation, including his conduct as a *pro se* party and as a Plaintiff in conjunction with five different appearances by lawyers, including the resources of eight (8) different judges in six (6) different courts.

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. On December 18, 2017, Beasley filed a first and second notice of appeal in which Beasley appeals

⁴ According to the briefing, there is no transcript for the November 3, 2017 hearing.

⁵ The reference to the case involving a dismissal of all claims is to an unrelated case titled *Beasley v. Richardson*, No. 05-15-01156-CV, 2016 WL 5110506 (Tex. App.—Dallas 2016, pet. denied).

from “the Final Judgment order entitled ‘Order Granting Attorney’s fees [sic] as Prevailing Party on Declaratory Judgment Claims’ for Defendant.”⁶

ANALYSIS

A. Summary Judgment and Award of Attorney’s Fees

In the first issue, Beasley presents an argument which seeks for this Court to “correct a denied motion for summary judgment when the court erred, as a matter of law, by declaring the wrong party as having prevailed in support of an unnecessary, unreasonable, unjust and inequitable judgment for attorney fees.” In four sub-issues, Beasley argues as follows: (1) the award of attorney’s fees is erroneous where there is no showing it was reasonable, necessary, just or equitable and when Beasley should have prevailed on the declaratory judgment claim; (2) the expulsion was void, as a matter of law for violating due process, as the Board refused to tell Beasley the reasons he faced expulsion and did not provide proper notice, and Beasley was entitled to relief by summary judgment; (3) the expulsion was void, as a matter of law, as the Board did not have a quorum and Beasley was entitled to summary judgment; and (4) the finding of “who prevailed” is an issue of fact to have been tried by a jury.

Beasley argues that the “trial court entered a final judgment declaring SIM Dallas the prevailing party on Beasley’s denied motion for summary judgment.” The trial court’s order granting attorney’s fees, however, is unrelated to Beasley’s July 5th motion for partial summary judgment. As stated in the order, the trial court declared SIM-DFW the prevailing party on Beasley’s declaratory judgment claims and granted SIM-DFW an award of attorney’s fees

⁶ Although we construe pro se pleadings and briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with the applicable laws and rules of procedure. *In re N.E.B.*, 251 S.W.3d 211, 211–12 (Tex. App.—Dallas 2008, no pet.); *see also Gonzalez v. VATR Const. LLC*, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.) (“Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support his contention.”). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *In re N.E.B.*, 251 S.W.3d at 212.

pursuant to section 37.009 of the Texas Civil Practice and Remedies Code. Accordingly, to the extent that Beasley is arguing that an award of attorney's fees to SIM-DFW under section 37.009 was improper, we address such arguments below in sections A(1) and (2).⁷ To the extent that Beasley is reasserting summary judgment arguments which were previously denied by the trial court, we will not address such arguments in this opinion because Texas law generally prohibits appellate review of a trial court's interlocutory order denying a party's motion for summary judgment.⁸ *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007) (recognizing that the denial of summary judgment is normally not appealable); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996) ("The general rule is that a denial of a summary judgment is not reviewable on appeal."). Here, Beasley's motion was a motion for partial summary judgment and it is not properly before us. *See id.*

1) Attorney Fees (Sub-issue One)

In sub-issue one of the first issue, Beasley argues that the award of attorney's fees is erroneous because the award was unnecessary, unreasonable, unjust and inequitable.⁹ Here, Beasley argues that the fees awarded were not just or equitable because SIM-DFW could have reduced its fees by taking certain actions such as pursuing dismissal of Beasley's lawsuit prior to engaging protracted and costly discovery. Beasley also argues that the amount of fees requested by SIM-DFW's attorneys could not be considered reasonable because such an amount was not "reasonable and necessary in defense of 'who is a member of a voluntary association.'"

⁷ We address sub-issue one of the first issue to the extent Beasley is arguing that the award of attorney fees is erroneous in section A(1). We also address sub-issue four of the first issue as to whether "who prevailed" is an issue of fact to have been tried by a jury in section A(2).

⁸ For the reasons stated in the text, we will not address sub-issue one of the first issue to the extent that Beasley is arguing that he should have prevailed on the declaratory judgment claim. We will also not address sub-issues two or three of the first issue which are summary judgment arguments previously made by Beasley which are not properly before us.

⁹ Section 37.009 of the Texas Civil Practice & Remedies Code provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are just and equitable."

In response, SIM-DFW notes that the trial court requested, and it provided, affidavits of defense counsel supporting the request for attorney’s fees. SIM-DFW noted that the affidavits detailed “the amount of fees incurred in the defense of Appellant’s claims, segregate the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and address the factors in *Arthur Andersen v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997).” In response to Beasley’s arguments about what SIM-DFW could have done to reduce its fees, SIM-DFW notes that the trial court “relied on the procedural history of the case and Appellant’s litigation history as an experienced *pro se* litigant who abuses the courts, wastes significant judicial resources, and uses lawsuits as a means to ‘negotiate’ private and non-justiciable matters to his satisfaction.”¹⁰ SIM-DFW further asserts that because there is no reporter’s record for the November 3, 2017 hearing, this Court must presume that the evidence supports the trial court’s judgment.

An award of attorney’s fees under the Declaratory Judgments Act is reviewed for abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court’s decision. *Indian Beach Prop. Owners’ Ass’n v. Linden*, 222 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2007, no pet.). It is an abuse of discretion for the trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet*, 972 S.W.2d at 21. In addition, we review the evidence in the light most favorable to the trial court’s ruling, indulging every presumption in its favor. *Feldman v. KPMG LLP*, 438 S.W.3d 678, 686 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

¹⁰ As noted above, the trial court considered both Beasley’s prior litigation history and his conduct during this litigation when awarding SIM-DFW its attorney’s fees and costs in defense of the declaratory judgment claims.

The Declaratory Judgments Act imposes four limitations on the court's discretion to award attorney's fees. *Bocquet*, 972 S.W.2d at 21. The first two limitations are that the fees must be reasonable and necessary and these are fact questions for the trier of fact's determination.¹¹ *See id.* The other two limitations on attorney's fees are that they must be equitable and just and these are questions of law. *Feldman*, 438 S.W.3d at 686.

In regard to the reasonableness and necessity of the fees, a factfinder should consider the following facts: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular appointment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of the collection before the legal services have been rendered. *See Arthur Andersen & Co.*, 945 S.W.2d at 818. In this case, SIM-DFW submitted the affidavits following the hearing which addressed the amount of fees incurred in the defense of Beasley's claims, segregated the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and addressed the *Arthur Andersen* factors. Further, we note that we do not have a reporter's record of the November 3, 2017 hearing to review. Without this record, we are unable to evaluate what evidence or testimony was relied on by the trial court during the hearing and we must presume that the evidence supports the trial court's judgment. *See Favaloro v. Comm'n for Lawyer Discipline*, 994 S.W.2d 815, 821 (Tex. App.—Dallas 1999, pet. stricken) ("If the appellant fails to bring forward a complete record, the court will conclude appellant has

¹¹ We address the issue of why a jury did not determine the amount of fees in section A(2), *infra*.

waived the points of error dependent on the state of the evidence.”); *Rush v. Barrios*, 56 S.W.3d 88, 96 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“No record was made of the hearing on the motion for fee forfeiture, and we must support the judgment of the trial court on any legal theory applicable to the case.”). Finally, we note that the trial court did not award SIM-DFW the full amount of the fees it requested. Based on our review of the record, we cannot conclude that the trial court abused its discretion in determining that attorney’s fees in the amount of \$211,032.02 were reasonable and necessary.

Under section 37.009, a trial court may exercise its discretion to award attorney’s fees to the prevailing party, the nonprevailing party, or neither. *Feldman*, 438 S.W.3d at 685. Here, the trial court determined that SIM-DFW was the prevailing party on Beasley’s declaratory judgment claims and was entitled to an award of attorney’s fees because Beasley had filed a nonsuit to avoid an unfavorable ruling. *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011). (holding that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant’s motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits). In its order, the trial court stated that it considered the pleadings, evidence, and arguments of counsel and listed numerous factors in support of its decision to award fees, such as Beasley’s prior litigation history, the timing of the nonsuit, and Beasley’s conduct in this litigation. We note that the determination of whether an award of attorney’s fees would be equitable or just is not susceptible to direct proof but instead is a matter of fairness in light of all the circumstances. *See Anglo-Dutch Petroleum Int’l v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 494 (Tex. App.—Houston [14th Dist.], pet. denied). Under the circumstances described above, we conclude that the trial court did not abuse its discretion in determining that an award of fees to SIM-DFW was equitable and just.

Accordingly, we overrule Beasley’s sub-issue one of the first issue.

2. Waiver of Jury Trial (Sub-issue Four)

In sub-issue four of the first issue, Beasley argues that all questions of fact should be decided by a jury and that his declaratory judgment action “was entitled to trial by a jury.” In regard to this argument, we note that there was no issue of fact for a jury to determine following Beasley’s nonsuit of his declaratory judgment claims. Beasley then argues that the “determination of the amount of fees that are reasonable and necessary is a question of fact for the jury.” We agree with Beasley’s assertion that the reasonableness and necessity of fees is a fact issue. *Bocquet*, 972 S.W.2d at 21. Beasley, however, has not set forth any evidence that he raised an objection to the trial court, not a jury, making this determination. As an appellate court, we review a trial court’s ruling or an objection to its refusal to rule. *See* Tex. R. App. P. 33.1(a)(2); *Texas Dep’t of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex.2001) (constitutional claim on appeal in paternity suit waived by failure to raise complaint at trial) (citing *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex.1993)); *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 448–49 (Tex. App.—Dallas 2011, no pet.). “Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds.” *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). This is called preservation of error and requires that “a party’s argument on appeal must comport with its argument in the trial court.” *Knapp v. Wilson N. Jones Mem’l Hosp.*, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.); *see* TEX. R. APP. P. 33.1(a)(1). If an issue has not been preserved for appeal, we should not address it because nothing is presented for our review. *See In re R.B.*, 200 S.W.3d 311, 317 (Tex. App.—Dallas 2006, pet. denied) (preservation of error requires a timely objection in the absence of which nothing is presented for appellate court review).

Here, Beasley’s supplemental brief, as requested by the trial court, did not contain any objection to the trial court determining the reasonableness or necessity of attorney’s fees.¹² Further, there is no reporter’s record of the November 3, 2017 hearing so there is no record that any objection was made and ruled upon by the trial court. Accordingly, as Beasley cannot demonstrate that error was preserved, he has waived his right to complain on appeal that the trial court denied his right to a jury on the issue of reasonableness and necessity of fees. *See Sunwest Reliance Acquisitions Group v. Provident Nat’l Assurance Co.*, 875 S.W.2d 385, 387 (Tex. App.—Dallas 1993, no pet.) (holding that “when a party has perfected its right to a jury trial in accordance with rule 216 but the trial court instead proceeds to trial without a jury, the party must, in order to preserve any error by the trial court in doing so, either object on the record to the trial court’s action or indicate affirmatively in the record it intends to stand on its perfected right to a jury trial.”). Accordingly, in this instance, the trial court was the proper party to decide the issue of attorney fees because Beasley waived his right to have a jury decide this issue. For all the reasons described above, we overrule Beasley’s sub-issue four of the first issue.

B. Lack of Jurisdiction to Award Attorney’s Fees

In Beasley’s second issue, he argues that the trial court lacked jurisdiction to have a nonsuited defendant file a motion for attorney’s fees and subsequently grant an award of fees which had not been requested before the nonsuit. Rule 162 provides that a dismissal “under this rule shall have no effect on any motion for sanctions, attorney’s fees or other costs, pending at the time of dismissal, as determined by the court.” TEX. R. CIV. P. 162.

¹² In his objections to the Bragalone and Vogel (SIM-DFW’s trial court attorneys) affidavits, Beasley did make the following objection: “Plaintiff further objects to the use of the evidence as a denial of due process and plaintiff’s right to trial by jury.” This objection, however, was filed after the hearing took place on November 3, 2017.

Both parties concede that SIM-DFW’s answer contained a request for attorney’s fees in its conclusion and prayer.¹³ To the extent that Beasley is contesting the timeliness of SIM-DFW’s request for attorney’s fees, we find Beasley’s argument unpersuasive. The Texas Supreme Court has decided that “the trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit” while the court retains its plenary power. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010); *see also Scott & White Mem’l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (“Rule 162 merely acknowledges that a nonsuit does not affect the trial court’s authority to act on a pending sanctions motion; it does not purport to limit the trial court’s power to act on motions filed after a nonsuit. In this case, the trial court imposed sanctions while it retained plenary jurisdiction. Nothing in Rule 162 or any previous decision of this Court deprives a trial court of this power.”). Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by the costs it incurred in defending baseless pleadings. *Travelers Ins. Co.*, 315 S.W.3d at 864. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting the aggrieved party. *Id.* at 864–65. The same analysis applies to a motion for attorney’s fees filed after a nonsuit. *See Proler v. City of Houston*, 499 S.W.3d 12, 15 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“Rule 162 ‘permits the trial court to hold hearings and enter orders affecting . . . attorney’s fees . . . even after notice of nonsuit is filed.’”).

Here, the trial court elected not to award sanctions but requested that the parties provide briefing on the issue of attorney’s fees. The trial court’s order concluded that Beasley nonsuited his case to avoid an unfavorable ruling on the merits and, following a hearing, the trial court elected to award attorney’s fees pursuant to section 37.009 of the Texas Civil Practice and Remedies Code.

¹³ The clerk’s record does not contain a copy of SIM-DFW’s answer.

Further, all of these actions took place within the trial court's plenary jurisdiction.¹⁴ Accordingly, we cannot conclude that the request for attorney's fees was untimely.

Beasley also argues that the attorney's fees should not be allowed because "a trial judge is prohibited from imposing sanctions, veiled as attorney's fees, against a nonsuiting party on the court's own motion." In support of this assertion, Beasley cites to *Dean v. Riser*, 240 F.3d 505, 508 (5th Cir. 2001). The *Dean* case, however, addresses the impact of a voluntary dismissal of a civil rights case on whether defendant was entitled to attorney's fees as a prevailing party under 42 U.S.C. § 1983. *Id.* at 507. That court ultimately remanded the case to the trial court for a determination of whether plaintiff withdrew to avoid an unfavorable judgment on the merits. *Id.* at 511. As the *Dean* case addresses attorney's fees under a federal statute, we do not find it relevant or persuasive. We note, however, that the trial court in this case did conclude that Beasley filed a nonsuit to avoid an unfavorable ruling on the merits and, as described above, awarded SIM-DFW its attorney's fees in accordance with section 37.009 of the Texas Civil Practice and Remedies Code.

For all the reasons described above, we overrule Beasley's second issue.

C. Disqualification and Recusal

In his third issue, Beasley argues that the trial court judge should have been disqualified or have recused herself for advocating for one party over another. Beasley specifically argues that the trial judge should have been recused or disqualified because she was not impartial and acted as counsel for SIM-DFW.

¹⁴ The order of dismissal was signed on October 9, 2017. Therefore, the trial court's plenary jurisdiction expired thirty days after October 9, 2017. See *In re Bennett*, 960 S.W.3d 35, 38 (Tex. 1997) ("However, the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court's plenary power expires.").

1) Additional facts

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. Judge Moore declined to recuse herself and requested that another judge be assigned to hear the motion. On November 22, 2017, the presiding judge of the judicial region signed an order denying plaintiff's motion to disqualify and recuse judge which provided as follows:

After considering the evidence, the undersigned finds the motion should be denied. Without limitation, the motion is untimely because Plaintiff's complaints and evidence show that the rulings and actions of the judge for which he seeks recusal begin in January of 2017 and continue throughout 2017. Yet Plaintiff did not file a recusal motion until November 20, 2017. While one of Plaintiff's assertions is that the judge became an advocate for Defendant at a sanctions hearing, such complaint, again, is lodged after many months of rulings and actions Plaintiff contends support recusal; the judge's November 3 ruling on sanctions also is grounded in the history of the case.

To the extent Plaintiff seeks disqualification of the judge, he has presented no valid legal or factual basis for disqualification.

2) Analysis

Beasley argues that the trial court judge should have been disqualified pursuant to the Texas Constitution and the Texas Rules of Civil Procedure because she acted as counsel in the case.¹⁵ Beasley specifically argues that the trial judge "conducted legal research" and "advocated" that SIM-DFW could pursue attorney's fees. Here, however, there was no assertion that the trial judge has served as a lawyer in the matter in controversy. Before a judge is disqualified on this ground, "it is necessary that the judge acted as counsel for some of the parties in [the] suit before him in some proceeding in which the issues were the same as in the case before him." *In re*

¹⁵ See TEX. CONST. art. V, § 11 ("No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."); TEX. R. CIV. P. 18b(a)(1) ("A judge must disqualify in any proceeding in which: the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . .").

O'Connor, 92 S.W.3d 446, 448 (Tex. 2002). Beasley’s argument that the trial judge acted “as counsel” in this case because the trial judge conducted independent research and requested further briefing or expressed her thoughts at hearings does not fall within the scope of the disqualification grounds of either the Constitution or the Texas Rules of Civil Procedure and, accordingly, we overrule this argument.

Beasley also argues that the trial court should have recused herself because of her bias and prejudice against him. The Texas Rules of Civil Procedure provide that a judge must recuse in any proceeding in which the judge’s “impartiality might reasonably be questioned” or if the judge has a “personal bias or prejudice concerning the subject matter of a party.” *See* TEX. R. CIV. P. 18b(b)(1)-(2). We review an order denying a motion to recuse for abuse of discretion. *Drake v. Walker*, 529 S.W.3d 516, 528 (Tex. App.—Dallas 2017, no pet.). The movant bears the burden of proving recusal is warranted, and the burden is met only through a showing of bias or impartiality to such an extent that the movant was deprived of a fair trial. *Id.* Further, bias by an adjudicator is not lightly established and judicial rulings alone almost never constitute a valid basis for a motion to recuse based on bias or partiality. *Id.* Here, Beasley argues that the trial judge was biased because she raised the vexatious litigant statute during a hearing, requested additional briefing on the issue of attorney’s fees, and subsequently awarded a “large, flagrant attorney fees award against Beasley.” We conclude that Beasley did not meet his burden to establish bias and overrule his third issue.

CONCLUSION

On the record of this case, we affirm the trial court’s judgment.

/David Evans/
DAVID EVANS
JUSTICE

171286F.P05

Exhibit C

No. 19-0041

In the Supreme Court of Texas

Peter Beasley,
Petitioner,

vs.

Society of Information Management, Dallas Area Chapter,
Respondent.

On Petition for Review from the
Fifth District Court of Appeals at Dallas, Texas
No. 05-17-01286-CV

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Table of Contents

Identity of Parties and Counsel	i
Table of Contents.....	iii
Index of Authorities	v
Statement of the Case.....	ix
Statement of Jurisdiction.....	ix
Issues Presented	ix

When an appellant properly orders a partial reporter’s record under appellate rule 34.6(c), can the court of appeals presume that an unrequested transcript supports the judgment?

To recover attorney’s fees from a nonsuiting plaintiff by fee-shifting on the plaintiff’s claims, must the defendant plead for those fees before the nonsuit? If so, is a boilerplate prayer for “attorney’s fees . . . and further general relief” in a general-denial answer sufficient?

Reasons to Grant Review	1
Statement of Facts.....	3
Summary of the Argument.....	8
Argument	9
1. This Court should grant review to clarify that invocation of rule 34.6(c) bars the otherwise-applicable presumption that an unrequested transcript supports the judgment.....	9
A. Absent the presumption, the fee award lacks sufficient supporting evidence	9
B. The court of appeals improperly applied the general presumption concerning unrequested transcripts despite Beasley’s invocation of rule 34.6(c)	11

(i) This Court construes rules like statutes, giving effect to their plain language.....	11
(ii) Rule 34.6(c) prevents application of the general presumption by imposing the opposite one—that the record is complete	12
2. This Court should grant review to clarify whether a defendant’s fee-shifting claim must be filed before a nonsuit (and, if so, whether a boilerplate request in the prayer of a general-denial answer is sufficient). 15	
A. A claim for fee-shifting must be filed before nonsuit of the claim on which it is based	16
(i) <i>Epps</i> does not support an award of fees absent a pre-nonsuit claim for them	17
(ii) The court of appeals improperly analogized a claim for statutory attorney’s fees to a motion for sanctions.....	18
(iii) Permitting a post-nonsuit claim for attorney’s fees will deter plaintiffs from nonsuiting claims	19
B. A boilerplate request for attorney’s fees in the prayer of a general-denial answer isn’t sufficient.....	20
Conclusion	24
Certificate of Compliance.....	25
Certificate of Service	25
APPENDIX:	
Tab 1: Court of Appeals Opinion and Judgment	
Tab 2: Trial Court’s Judgment	
Tab 3: Request for Reporter’s Record	
Tab 4: Tex. R. App. P. 34.6	

Index of Authorities

Cases

<i>Beasley v. Society for Information Mgmt.</i> , No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed) (mem. op.)	ix, 7–8, 11
<i>Bocquet v. Herring</i> , 972 S.W.2d 19 (Tex. 1998)	9
<i>Burbage v. Burbage</i> , 447 S.W.3d 249 (Tex. 2014)	12
<i>Christiansen v. Prezelski</i> , 782 S.W.2d 842 (Tex. 1990)	14
<i>City of Dallas v. Albert</i> , 354 S.W.3d 368 (Tex. 2011)	17
<i>City of Laredo v. Montano</i> , 414 S.W.3d 731 (Tex. 2013) (per curiam)	10
<i>DeRoeck v. DHM Ventures, LLC</i> , 556 S.W.3d 831 (Tex. 2018)	21
<i>El Apple I, Ltd, v. Olivas</i> , 370 S.W.3d 757 (Tex. 2012)	10
<i>Epps v. Fowler</i> , 351 S.W.3d 862 (Tex. 2011)	4, 17
<i>Felderhoff v. Knauf</i> , 819 S.W.2d 110 (Tex. 1991)	20
<i>Ford Motor Co. v. Garcia</i> , 363 S.W.3d 573 (Tex. 2012)	11–12

<i>Galbraith Eng'g Consultatns, Inc. v. Pochucha,</i> 290 S.W.3d 863 (Tex. 2009)	11
<i>Garcia v. Sasson,</i> 516 S.W.3d 585 (Tex. App.—Houston [1st Dist.] 2017, no pet.)	14
<i>In re Bridgestone Americas Tire Operations, LLC,</i> 459 S.W.3d 565 (Tex. 2019) (orig. proceeding)	11
<i>In re City of Dickinson,</i> 568 S.W.3d 642 (Tex. 2019) (orig. proceeding)	11
<i>In re Christus Spohn Hosp. Kleberg,</i> 222 S.W.3d 434 (Tex. 2007) (orig. proceeding)	12
<i>In re Nat'l Lloyds Ins. Co.,</i> 532 S.W.3d 794 (Tex. 2017) (orig. proceeding)	9
<i>Kissman v. Bendix Home Systems, Inc.,</i> 587 S.W.2d 675 (Tex. 1979)	22–23
<i>Klein v. Dooley,</i> 949 S.W.2d 307 (Tex. 1997)	20
<i>Lane Bank Equip. Co. v. Smith S. Equip., Inc.,</i> 10 S.W.3d 308 (Tex. 2000)	12
<i>Long v. Griffin,</i> 442 S.W.3d 253 (Tex. 2014)	10
<i>Low v. Henry,</i> 221 S.W.3d 609 (Tex. 2007)	21
<i>Nolte v Flournoy,</i> 348 S.W.3d 262 (Tex. App.—Texarkana 2011, pet. denied)	21
<i>Rohrmoos Venture v. UTSW DVA Healthcare, LLP,</i> ____ S.W.3d ____, 2019 WL 1873428 (Tex. Ap. 26, 2019)	1, 10, 19

<i>Scott & White Mem. Hosp. v. Schexnider</i> , 940 S.W.2d 594 (Tex. 1996)	17
<i>Steves Sash & Door Co. v. Ceko Corp.</i> , 751 S.W.2d 473 (Tex. 1988)	23
<i>Sw. Bell Tel. Co. v. Garza</i> 164 S.W.3d 607 (Tex. 2004)	23
<i>Tex. Mut. Ins. Co. v. Ledbetter</i> , 251 S.W.3d 31 (Tex. 2008)	15, 19
<i>Travelers Ins. Co. v. Joachim</i> , 315 S.W.3d 860 (Tex. 2010)	18, 19
<i>Wells Fargo Bank v. Murphy</i> , 458 S.W.3d 912 (Tex. 2015)	15, 20

Statutes and Rules

TEX. GOV'T CODE ANN. § 22.001 (West Supp. 2017)	9
TEX. R. APP. P. 34.6(b)	12
TEX. R. APP. P. 34.6(c)	13
TEX. R. CIV. P. 47	21
TEX. R. CIV. P. 162	15
TEX. R. CIV. P. 301	15

Other Authorities

ALESSANDRA ZIEK BEAVERS, O'CONNOR'S TEXAS CIVIL APPEALS (2018)	13
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Statement of the Case

<i>Nature of the Case</i>	Declaratory judgment.
<i>Trial Court</i>	Hon. Maricela Moore, 162nd Judicial District Court, Dallas County.
<i>Trial Court's Disposition</i>	After plaintiff's non-suit, awarded attorney's fees of \$211,032.02 to defendant under declaratory-judgments act. (App. 2; C.R. 2156–58).
<i>Court of Appeals</i>	Affirmed—Fifth Court of Appeals (Dallas). Opinion by Justice Evans, joined by Justices Myers and Brown. <i>Beasley v. Society of Information Mgmt.</i> , No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed) (mem. op.) (App. 1).

Statement of Jurisdiction

This Court has jurisdiction because this petition presents important questions of law. TEX. GOV'T CODE ANN. § 22.001 (West Supp. 2017).

Issues Presented

1. When an appellant properly orders a partial reporter's record under rule 34.6(c), can the court of appeals presume that an unrequested transcript supports the judgment?

2. To recover attorney's fees from a nonsuiting plaintiff by fee shifting on the plaintiff's claim for relief, must the defendant plead for those fees before the nonsuit? If so, is a boilerplate prayer for "attorney's fees . . . and further general relief" in a general-denial answer sufficient?

Reasons to Grant Review

This petition presents two important procedural questions. First, what presumption about the record is permissible when an appellant requests a partial reporter's record under appellate rule 34.6(c)? Second, after a plaintiff nonsuits his claim, can the defendant recover attorney's fees by fee-shifting without asserting any claim for fees before the nonsuit? Each issue has important implications for Texas civil and appellate practice.

In a series of decisions culminating this year in *Rohrmoos*,¹ this Court has made clear that an award of attorney's fees under a fee-shifting provision must be supported by meaningful evidence—the old “nudge-and-a-wink” conclusory testimony won't cut it anymore. Yet here, the trial court awarded more than \$200,000 in attorney's fees without any evidentiary hearing and based solely on the lawyers' old-style conclusory affidavits.

In rejecting Beasley's sufficiency challenge to that award, the court of appeals presumed that an unordered transcript supported the judgment. But Beasley invoked and explicitly relied upon the partial-record provision of rule 34.6(c). If that rule means anything, it is that an appellate court *cannot* presume that an unordered transcript supports the judgment. Indeed, rule

¹ *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, ___ S.W.3d ___, 2019 WL 1873428, at *19–20 (Tex. Apr. 26, 2019).

34.6(c)(4) sweeps aside the normal presumption and imposes the opposite one—that an unordered transcript is *not* relevant to the appeal.

Independently, this Court has held that a party can file a motion for sanctions after a nonsuit so long as the trial court retains plenary power. Here, the court of appeals expanded that rule to embrace an after-filed claim for attorney’s fees. But a nonsuit nullifies all controversies related to the plaintiff’s claim other than a defendant’s *pending* claim for affirmative relief.

Beasley sued the Society for Information Management, Dallas Area Chapter for declaratory judgment. When Beasley nonsuited his claims, the Society had no counterclaim or motion for attorney’s fees. But the trial court—raising the matter *sua sponte*—nevertheless awarded the Society more than \$200,000 in fees on Beasley’s declaratory-judgment claim.

The court of appeals affirmed, holding that a claim for fees need not be filed before a nonsuit and, in any event, the Society’s boilerplate request for attorney’s fees in the prayer of its answer supported the award. The court rejected Beasley’s sufficiency challenge, applying the presumption that a missing transcript supports the judgment. But Beasley’s invocation of rule 34.6(c) should have barred this presumption.

This Court should grant review to clarify that—

- an appellate court may not apply the presumption concerning missing transcripts when the appellant properly invokes rule 34.6(c), and
- a claim for attorney’s fees based on fee-shifting under the plaintiff’s claim must be filed before a nonsuit.

Statement of Facts

The court of appeals omitted materials facts in its opinion. Most notably, it never mentioned Beasley’s invocation of rule 34.6(c).

Peter Beasley sued the Society for Information Management, Dallas Area Chapter² for whistleblower retaliation and breach of fiduciary duty seeking declaratory judgment, injunctive relief, and damages.³

The Society’s answer is not part of the record. But the Society concedes that its only “request” for fees was the following prayer at the end of its general-denial answer:

For the foregoing reasons, Defendants pray that Plaintiff take nothing by way of his claims, that Defendants recover their attorneys’ fees, costs and expenses as allowed by law, and for such other and further general relief, at law or in equity, as the ends of justice requires and to which the evidence may show it justly entitled.⁴

² The Society has been referred to throughout the litigation as the Society *of* Information Management rather than by its correct name, the Society *for* Information Management.

³ C.R. 9–36, 37–69, 573–83. Beasley also filed a jury demand. C.R. 464.

⁴ C.R. 2137; Appellee’s Brief at 15.

Non-suit and judgment

The Society filed a motion for summary judgment.⁵ Before the hearing of that motion, Beasley filed a notice of nonsuit.⁶ At that time, the Society had not asserted any counterclaim or filed any motion for sanctions or attorney's fees.⁷ The trial court signed an order dismissing the lawsuit.⁸

Two weeks later, the Society filed a motion for sanctions.⁹ During the hearing of that motion, the trial court expressed its opinion that sanctions were unwarranted.¹⁰ But the trial court raised the possibility of awarding the Society fees under the declaratory-judgments act based on Beasley's possible use of the nonsuit to avoid an unfavorable ruling.¹¹ The trial court cited *Epps v. Fowler*¹² as authorizing such an award. When Beasley's counsel argued the award would be unsupported by any pleading,¹³ the trial court requested briefing on whether the Society had any pending pleading for fees.¹⁴

⁵ C.R. 16, 1173–77. The motions are not in the appellate record.

⁶ C.R. 1176–77.

⁷ C.R. 9–28.

⁸ C.R. 9, 28. The order is not included in the appellate record but is reflected on the trial court's docket sheet.

⁹ C.R. 1178–1276.

¹⁰ 4 R.R. 13.

¹¹ 4 R.R. 36; *see also* 4 R.R. 39.

¹² 351 S.W.3d 862 (Tex. 2011).

¹³ 4 R.R. 39.

¹⁴ 4 R.R. 38–40.

That evening, the Society supplemented its sanctions motion to request attorney's fees under the declaratory-judgments act. But the Society ignored the trial court's question; it did not cite any pleading for fees.¹⁵ Beasley filed a response arguing the Society had no pleading to support any fee award.¹⁶

On November 3, 2017, the trial court conducted another hearing on the Society's fee request. The transcript of that hearing is not part of the appellate record (more on that to come). But the notice of hearing was for "continued argument" on the motion for sanctions and availability of fees.¹⁷

After the hearing, the Society's lawyer sent a letter to the trial court stating that counsel had "conferred about the amount of fees but did not reach an agreement."¹⁸ The Society tendered affidavits from two of its lawyers concerning attorney's fees.¹⁹ One of the lawyers included a paragraph in his affidavit describing general categories of services that he performed (for example, "review[ing] pleadings and motions filed by Peter

¹⁵ C.R. 2118–2128.

¹⁶ C.R. 2137.

¹⁷ C.R. 2129–30.

¹⁸ C.R. 2140.

¹⁹ C.R. 2142–55.

Beasley”).²⁰ But neither lawyer detailed the services performed or time spent on particular tasks. And neither of them tendered their invoices.²¹

Beasley objected to the lawyers’ affidavits as hearsay, objected to the trial court’s failure to conduct a jury trial on fees, and protested that “[n]o agreement was made among the parties to prove attorney’s fees in this manner.”²²

The trial court denied the motion for sanctions²³ but signed an order awarding the Society attorney’s fees of \$211,032.02 as a prevailing party under the declaratory-judgments act.²⁴

*The court of appeals affirms based on a missing transcript—
ignoring Beasley’s invocation of rule 34.6(c)*

Beasley filed notice of this appeal,²⁵ requesting a partial reporter’s record under rule 34.6(c) of the rules of appellate procedure. As required by that rule, he listed his appellate points in the request.²⁶ Neither Beasley nor the Society requested any transcript of the November 3 hearing.²⁷

²⁰ C.R. 2149.

²¹ C.R. 2142–55.

²² C.R. 2166.

²³ C.R. 2169.

²⁴ App. 1; C.R. 2156–58.

²⁵ C.R. 2170–71, 2651.

²⁶ App. 3; C.R. 2661–63.

²⁷ C.R. 35, App. 3; 2661–63.

On appeal, among other issues, Beasley argued that: (1) the fee award was improper due to the lack of supporting evidence, and (2) the Society lacked any pleading to support the award.²⁸

In its brief, the Society acknowledged that its lawyers' affidavits were the only evidence of fees.²⁹ But the Society argued the court of appeals had to presume the unrequested November 3 transcript supported the trial court's judgment.³⁰ In reply, Beasley—

- cited his “limited appeal” under rule 34.6(c),
- argued the Society never exercised its prerogative under that rule to order the transcript, and
- invoked the mandatory presumption under rule 34.6(c) requiring the appellate court “to presume nothing omitted from the record [was] relevant”³¹

The court of appeals affirmed. *Beasley v. Society of Information Mgmt.*, No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed) (mem. op.).³²

With regard to the evidence supporting the reasonableness and necessity of the fees, the court—without mentioning rule 34.6(c) or

²⁸ Appellant's Brief at 19, 30; Appellant's Reply Brief at 12.

²⁹ Appellees' Brief at 18.

³⁰ Appellees' Brief at 19.

³¹ Appellant's Reply Brief at 13.

³² App. 1.

Beasley’s request for a partial record—held that the unrequested transcript required it to “presume that the evidence [from the hearing] supports the trial court’s judgment.” *Id.* at *4 (citations omitted). The court also pointed to the missing transcript in concluding that Beasley could not establish preservation of any error in denying him a jury trial on fees. *Id.* at *6.

As to the pleadings, the court held that: (1) the Society’s general prayer for fees supported the award, and (2) the Society’s request did not need to be pending before Beasley’s non-suit anyway. *Id.* at *6.

Summary of the Argument

This Court should grant review to clarify two important procedural issues.

First, when an appellant properly orders a partial record under rule 34.6(c), the appellate court must presume that partial record constitutes the entire record relevant to the stated points on appeal—even when those points include a sufficiency challenge. This mandatory presumption precludes application of the otherwise-applicable general presumption that an omitted portion of the record supports the judgment.

Second, a defendant seeking attorney’s fees as a result of fee-shifting under the plaintiff’s claim for relief must plead for those fees before the

plaintiff's nonsuit. And a general reference to fees in the prayer of a general-denial answer is not sufficient to do so.

Argument

- 1. This Court should grant review to clarify that invocation of rule 34.6(c) bars the otherwise-applicable presumption that an unrequested transcript supports the judgment.**

- A. Absent the presumption, the fee award lacks sufficient supporting evidence.**

The declaratory-judgments act permits the recovery of attorney's fees. "When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing the fees are reasonable and necessary." *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding) (citations omitted). Reasonableness and necessity are issues for the trier of fact. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (citations omitted).

The trial court awarded more than \$200,000 in attorney's fees without any evidentiary hearing or trial; the Society's lawyers simply filed affidavits concerning the fees.³³ Beasley never agreed to this abbreviated procedure and objected that he was entitled to a jury trial on the issue.³⁴

³³ C.R. 2142-55.

³⁴ C.R. 2166.

Even had Beasley agreed to proving fees by affidavit, the affidavits here were insufficient under this Court's recent decision in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, ___ S.W.3d ___, 2019 WL 1873428 (Tex. Apr. 26, 2019). In *Rohrmoos*, this Court reiterated the evidence necessary to establish reasonableness and necessity in a fee-shifting claim:

Sufficient evidence includes, *at a minimum*, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.

Id. at *20 (citation omitted and emphasis added).

The lawyers' affidavits fail to include all but one of these required items. They do not detail the particular services performed, who performed them, or when they were performed, and provide no information about the amount of time spent on any particular service. Under *Rohrmoos*, the affidavits are insufficient to support the award.³⁵

Beasley challenged the trial court's award based on the lack of sufficient supporting evidence. And no one could reasonably dispute that the lawyers' affidavits are insufficient to support the award.

³⁵ This should have been clear even before *Rohrmoos*, from cases like *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013) (per curiam), and *Long v. Griffin*, 442 S.W.3d 253 (Tex. 2014).

B. The court of appeals improperly applied the general presumption concerning unrequested transcripts despite Beasley's invocation of rule 34.6(c).

In rejecting Beasley's challenge, the court of appeals noted the unordered transcript and relied on the general rule that a missing transcript is presumed to support the trial court's judgment. *Beasley*, 2018 WL 5725245, at *4 (citations omitted). But Beasley requested a partial reporter's record under rule 34.6(c). This request should have precluded application of the general presumption and mandated a contrary presumption that the record was complete.

(i) *This Court interprets rules like statutes, giving effect to their plain language.*

In construing procedural rules, this Court's "primary objective is to give effect to the drafter's intent as expressed in the rule's language." *In re City of Dickinson*, 568 S.W.3d 642, 645–46 (Tex. 2019) (orig. proceeding) (citing *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009)).

This Court analyzes procedural rules "apply[ing] the same rules of construction that govern the interpretation of statutes." *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) (orig. proceeding) (citing *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex.

2012)). The Court “look[s] first to the rule’s language and construe[s] it according to its plain meaning.” *Id.* (citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007)). And—recognizing that procedural rules are part of a cohesive whole—the Court “consider[s] them in context rather than as isolated provisions.” *Id.* at 646 (citation omitted).

Finally, the Court rejects form-over-substance requirements that favor procedural machinations over reaching the merits of a case:

Appellate procedure should not be tricky. It should be simple, it should be certain, it should make sense, and it should facilitate consideration of the parties’ arguments on the merits.

Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 314 (Tex. 2000) (Hecht, J., concurring). Thus, the Court construes procedural rules “liberally so that the right to appeal is not lost unnecessarily.” *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014).

(ii) *Rule 34.6(c) prevents application of the general presumption by imposing the opposite one—that the record is complete.*

Rule 34.6 requires an appellant to “request in writing that the official reporter prepare the reporter’s record.” TEX. R. APP. P. 34.6(b)(1). In doing so, an appellant must “designate the portions of the proceedings to be

included.” *Id.* But Rule 34.6(c) permits an appellant to order a partial reporter’s record:

If the appellant requests a partial reporter’s record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points and issues.

TEX. R. APP. P. 34.6(c)(1). In that event, “[a]ny other party may designate additional exhibits and portions of the testimony to be included in the reporter’s record.” TEX. R. CIV. P. 34.6(c)(2).

Rule 34.6(c)(4) requires an appellate court to presume that the record is complete for purposes of appeal—meaning an unrequested portion of the record is *not* relevant to disposition of the appeal—even on a sufficiency challenge:

The appellate court must presume that the partial reporter’s record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.

TEX. R. APP. P. 34.6(c)(4). A leading guide to appellate practice confirms the presumption concerning missing portions of the record does not apply to “limited records under TRAP 34.2 or 34.6(c).” ALESSANDRA ZIEK BEAVERS, O’CONNOR’S TEXAS CIVIL APPEALS 270 (2018) (citations omitted).

Rule 34.6(c), then, provides an orderly procedure for appeals based on a partial record. It permits an appellant to request a partial record and designate the issues on appeal. This puts the appellee on notice that the appellate court will presume the designated portions of the record constitute the entire record for reviewing those issues. To prevent this, the appellee can order any additional portion of the record it deems necessary. If the appellee does not designate any additional portion, rule 34.6(c) requires an appeals court to presume the record is complete as to the designated issues.

Rule 34.6(c) prevents parties from having to order unnecessary portions of the record, thereby alleviating the strain on court reporters and reducing both the time and cost of an appeal. At the same time, the rule protects an appellee from having to defend an appeal without parts of the record that support its defense.

Nothing in Rule 34.6(c) relieves an appellant of the ultimate burden to bring forth a record showing reversible error. *See generally Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). Proper invocation of the rule simply “prevents the application of the general presumption that any missing portions of the record support the trial court’s judgment in favor of a presumption that the partial record submitted by the parties includes all

portions of the record relevant to the enumerated points or issues to be presented on appeal.” *Garcia v. Sasson*, 516 S.W.3d 585, 590–91 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Except that here, it didn’t.

Whether by oversight or intentionally, the court of appeals violated rule 34.6(c) and wrongfully deprived Beasley of a merits decision on his sufficiency challenge—a decision that almost inarguably would have resulted in reversal and remand for a trial on attorney’s fees. This Court should grant review to clarify that once properly invoked, rule 34.6(c) precludes application of the presumption concerning an unrequested transcript.

2. **This Court should grant review to clarify whether a defendant’s fee-shifting claim must be filed before a nonsuit (and, if so, whether a boilerplate request in the prayer of a general-denial answer is sufficient).**

Rule 162 of the Texas Rules of Civil Procedure permits a plaintiff to nonsuit its claims at any time before closing at trial. TEX. R. CIV. P. 162. Such a nonsuit does not “prejudice the right of an adverse party to be heard on a pending claim for affirmative relief” or have any effect on a “motion for sanctions, attorney’s fees, or other costs, pending at the time of dismissal, as determined by the court.” *Id.* “Parties have an absolute right to nonsuit *their own* claims, but not *someone else’s* claims they are trying to avoid.” *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 37 (Tex. 2008) (emphasis in original).

When Beasley nonsuited his declaratory-judgment claim, it should have extinguished all controversies relating to that claim other than any pending claim by the Society for affirmative relief. The court of appeals held that Beasley's nonsuit of his declaratory-judgment claims did not prevent the Society from recovering attorney's fees—*on that claim*—for two reasons.

First, the court held that the Society's fee-shifting claim did not have to be asserted before Beasley's nonsuit. Second, the court held that the Society's boilerplate reference to fees in its general-denial answer constituted a fee-shifting claim under the declaratory-judgments act. Both holdings are erroneous.

A. A claim for fee-shifting must be filed before non-suit of the claim on which it is based.

As this Court held just four years ago, a party seeking fees under the declaratory-judgments act “must affirmatively plead for them to be eligible for a judgment containing a fee award.” *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015) (citing TEX. R. CIV. P. 301). And, for a variety of reasons, such a pleading must be filed before the plaintiff nonsuits the declaratory-judgment claim.

A plaintiff's nonsuit of a claim for relief renders the merits of that claim moot and deprives the court of jurisdiction over it:

If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and jurisdiction as to the claim is lost.

City of Dallas v. Albert, 354 S.W.3d 368, 375 (Tex. 2011) (internal citations omitted). “But a nonsuit is not allowed to prejudice the right of an adverse party to be heard on a pending claim for affirmative relief.” *Id.* Thus, a nonsuit does not deprive the trial court of its power to decide a sanctions motion or “any other motion” filed before the expiration of plenary power. *Scott & White Mem. Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996).

(i) ***Epps does not support an award of fees absent a pre-nonsuit claim for them.***

The trial court awarded fees based on its mistaken belief that *Epps* supported the award. In *Epps*, this Court held that a defendant may be a “prevailing party” entitled to contractual attorney’s fees when the plaintiff nonsuits to avoid an unfavorable ruling on the merits. *Epps*, 351 S.W.3d at 862, 868–69. But in *Epps*, the defendant had asserted the right to recover fees under the parties’ contract ***before*** the nonsuit—that claim was pending at the time of the nonsuit. *Id.* at 865. And that is the critical distinction.

Epps prevents a plaintiff from nonsuiting to avoid an unfavorable ruling that otherwise would entitle the defendant to recover attorney’s fees. In other words, a nonsuit should not deprive the defendant of attorney’s fees

it was on the cusp of obtaining via a ruling on the merits. But that isn't the situation where the defendant never pleads for fees before the nonsuit.

The Society never asked for attorney's fees under the declaratory-judgments act before Beasley's nonsuit. If Beasley had not nonsuited, and the Society had prevailed on its motion for summary judgment, it still would not have recovered attorney's fees. Thus, the Society was in no worse position as a result of the nonsuit. The trial court misread *Epps*.

(ii) The court of appeals improperly analogized a claim for statutory attorney's fees to a motion for sanctions.

This Court has held that “the trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit” so long as the court retains plenary power. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) (citation omitted). The court of appeals improperly applied this principle to the Society's after-asserted claim for attorney's fees.

The Society sought an award of attorney's fees under the declaratory-judgments action. This was a statutory fee-shifting claim based on Beasley's claim for declaratory judgment—not a “collateral matter.”

A claim for affirmative relief is one on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of

action.” *Ledbetter*, 251 S.W.3d at 38 (citations and internal quotation marks omitted). The Society could recover fees under the declaratory-judgments act even if Beasley abandoned his cause of action—so long as it asserted that entitlement before the nonsuit.

A claim for statutory attorney’s fees differs fundamentally from a “collateral matter” like a motion for sanctions. Texas courts impose sanctions to deter misconduct and compensate parties for costs incurred in defending baseless pleadings. *Travelers Ins. Co.*, 315 S.W.3d at 864. Rule 162 should not be permitted to frustrate these purposes by allowing a party to evade sanctions simply by nonsuiting an aggrieved opponent. *Id.* at 864–65.

But this has nothing to do with a claim for attorney’s fees founded in statutory entitlement. Awarding attorney’s fees in fee-shifting situations is a matter of compensation to the prevailing party for reasonable losses in litigation, not punishment for misconduct. *See generally Rohrmoos*, 2019 WL 1873428, at *11 (citation omitted).

(iii) Permitting a post-nonsuit claim for attorney’s fees will deter plaintiffs from nonsuiting claims.

Rule 162 serves an important systemic purpose by permitting plaintiffs to discontinue lawsuits where circumstances render further litigation inappropriate. Permitting a defendant to raise a post-nonsuit fee-shifting

claim “would have a chilling effect on appropriate nonsuits” *See generally Klein v. Dooley*, 949 S.W.2d 307, 308 (Tex. 1997) (citation omitted).

Where a defendant, like the Society, chooses not to assert any entitlement to attorney’s fees under the plaintiff’s claim, the plaintiff should be able to nonsuit that claim without risking a post-nonsuit assertion of the claim. Any other rule would mean that a plaintiff like Beasley, asserting a claim that permits fee-shifting, “would have no choice but to continue the litigation process, whether further litigation was appropriate or not.” *Felderhoff v. Knauf*, 819 S.W.2d 110, 111 (Tex. 1991). Encouraging the pursuit of claims that should be abandoned would be undesirable both for the individual litigants and for the justice system.

B. A boilerplate request for attorney’s fees in the prayer of a general-denial answer isn’t sufficient.

In *Wells Fargo*, this Court held that a party properly pleaded for attorney’s fees where both parties sought declaratory relief and the prevailing party sought fees ***both*** by pleading its entitlement “pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code” ***and*** by a general request in its prayer for relief. *Wells Fargo*, 458 S.W.3d at 915–16. This case presents an important question left unresolved by *Wells Fargo*: What about a party who recovers fees defensively and includes ***only*** a general

request for fees in its prayer for relief?

The court of appeals held that the Society's boilerplate prayer for "attorney's fees . . . and general further relief" in its answer was sufficient to support the trial court's award. At least one other intermediate appellate court has reached the same result. *Nolte v. Flourney*, 348 S.W.3d 262, 270 n.3 (Tex. App.—Texarkana 2011, pet. denied).

This Court should grant review to reject this reasoning and clarify that a boilerplate prayer for attorney's fees in an answer is not sufficient to assert an affirmative claim for fees. If a defendant wants to recover fees under a fee-shifting provision, the defendant must assert a claim for those fees.

Texas follows the "fair notice" standard for pleadings. *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007). Rule 47 requires that "[a]n original pleading which sets forth a claim for relief . . . shall contain . . . a short statement of the cause of action sufficient to give fair notice of the claim involved" TEX. R. CIV. P. 47. "The key inquiry is whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *DeRoeck v. DHM Ventures, LLC*, 556 S.W.3d 831, 835 (Tex. 2018) (citation and internal quotation marks omitted).

The notion that the Society's reference to fees in the prayer of its answer notified Beasley that it was asserting a statutory claim to fees under the declaratory-judgments act turns the fair-notice standard on its head. Beasley could not possibly have divined that intent from the Society's boilerplate language—which is included in the concluding prayer of almost every answer filed in a Texas civil lawsuit (even in cases where everyone knows the defendant cannot possibly recover attorney's fees).

Moreover, permitting this type of boilerplate reference to fees in a concluding prayer—without any preceding reference to facts or law relating to recovery of fees—would amount to ambush-by-pleading. A party like Beasley would have no inkling of the assertion of a statutory fee-shifting claim when deciding whether to nonsuit his claim. And then, upon entry of the nonsuit, whammo! This is the very type of situation the fair-notice pleading requirement is designed to prevent.

This Court considered a similar situation in *Kissman v. Bendix Home Sys., Inc.*, 587 S.W.2d 675 (Tex. 1979). A DTPA plaintiff alleged in his petition that he sought to recover the difference in market value of a mobile home as warranted and as delivered; he did not assert any cause of action or otherwise seek damages for the cost of repairs. But after recovering those

damages, the plaintiff argued that his concluding prayer for general relief supported the award. This Court disagreed, holding that only “relief consistent with the theory of the claim reflected in the petition may be granted under a general prayer.” *Id.* at 677 (citation omitted).

To be sure, a party need not always identify a claim by name to provide fair notice of its pendency. Sometimes, for example, factual allegations make clear the nature of the claim being asserted. *See, e.g., Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 616–17 (Tex. 2004). *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988). But to constitute a claim for relief, a statement in the general prayer must relate back to *something* in the pleading—either supporting facts establishing assertion of the claim, or the enunciation of the claim itself.

The Society said nothing about attorney’s fees other than a passing reference in the prayer. Similar to *Kissman*, this was insufficient to provide fair notice of a statutory fee-shifting claim. *See Kissman*, 587 S.W.2d at 677.

This Court should grant review to clarify that a statutory fee-shifting claim must be asserted before a plaintiff’s nonsuit of the claim supporting recovery of fees—and that a passing reference in the prayer of a general-denial answer is not sufficient to do so.

Conclusion

The decision by the court of appeals rests on two errors important to Texas jurisprudence. This Court should grant review, reverse the decision by the court of appeals, and—if the Court sustains Beasley’s second issue on the lack of a pleading for fees—render judgment that the Society take nothing. Alternatively, if this Court sustains Beasley’s first issue concerning the partial reporter’s record, it should remand the case for further proceedings on the issue of fees.

Respectfully submitted,

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Certificate of Compliance

This brief was prepared using Microsoft Word. Relying on the word count function in that software, I certify that this petition contains 4,924 words (excluding the cover, tables, signature block, and certificates).

/s/Charles “Chad” Baruch

Certificate of Service

The undersigned certifies that a true and correct copy of this instrument was served this 5th day of August, 2019, by efileing and email, upon the following counsel of record:

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Exhibit D

Order entered March 30, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-01286-CV

PETER BEASLEY, Appellant

V.

**SOCIETY OF INFORMATION MANAGEMENT,
DALLAS AREA CHAPTER, ET AL., Appellees**

**On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03141**

ORDER

Before the Court is appellant's March 13, 2018 "Rule 12 Motion to Show Authority to Prevent any Constructive Fraud on the Court." We **DENY** the motion as untimely. *See* TEX. R. Civ. P. 12.

/s/ ADA BROWN
 JUSTICE